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DEPARTMENT OF NATURAL RESOURCES  
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Secretary

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**Secretary's Order No. 2018-W-0038**

**Re: Delaware City Refining Company, LLC's Application to Renew National Pollutant Discharge Elimination System Permits for its Delaware City Refinery and Delaware City Power Plant at 4550 Wrangle Hill Road, Delaware City in New Castle County**

**Date of Issuance: July 12, 2018**

**Effective Date: July 12, 2018**

Pursuant to 7 *Del. C.* §§ 6003, 6004(b), 6006(4) and all other relevant statutory authority, the Department of Natural Resources and Environmental Control ("Department") issues this Order, approving the renewal and amendment of the National Pollution Discharges Elimination System ("NPDES") permit governing discharges at the Delaware City Refinery at 4550 Wrangle Hill Road, Delaware City, DE ("Refinery").

**BACKGROUND**

On February 28, 2002, Motiva Enterprises, LLC, submitted the original renewal applications for the Refinery's two NPDES permits (DE005061 and DE0000256) regulating the Refinery's surface water discharges. Premcor Refining Group, Inc. ("Premcor") later purchased the Refinery from Motiva, including all of its permits and pending applications. Premcor thereafter sold the Refinery with all its permits and pending applications to the Delaware City Refining Company, LLC ("DCRC"). On December 5, 2014, DCRC supplemented the Application, providing additional information as required by the December 4, 2014, Settlement Agreement ("Settlement") between DCRC and DNREC.

The Department's Division of Water, Surface Water Discharge Section ("SWDS") reviewed the Application and prepared a Draft NPDES Permit and Fact Sheet pursuant to Section 6.0 of the Department's *Regulations Governing the Control of Water Pollution, 7 DE Admin. Code 7201* ("NPDES Regulation").

On December 14, 2014, *The News Journal* and the *Delaware State News* published public notices of the Application, the Draft Permit, and the Fact Sheet. This public notice commenced the 30 day public comment period that ended January 13, 2015.

The SWDS received numerous written public comments, including requests that the Department extend the time period for public comments and hold a public hearing. In response, the public comment period was extended until February 12, 2015, and the extension was published in both *The News Journal* and the *Delaware State News*.

By public notices published on February 18, 2015, in *The News Journal* and the *Delaware State News*, the Department announced that it would hold a public hearing on March 24, 2015, at Gunning Bedford Middle School, 801 Cox Neck Road, New Castle, New Castle County. These public notices also re-opened the public comment period for written comments until the conclusion of the public hearing.

Approximately 500 people attended the public hearing and provided comments. Robert Haynes, the Hearing Officer holding the hearing, granted an unopposed request to extend the public comment period for thirty days. There was significant interest in this proceeding, and the Department received many public comments.

Presiding Hearing Officer Haynes subsequently requested a technical assistance memorandum from the Surface Water Discharges Section ("SWDS"), but retired on June 1, 2018, prior to its completion. SWDS provided its Technical Response Memorandum ("TRM") by memorandum dated June 22, 2018, from Bryan Ashby to Hearing Officer Lisa Vest. Valerie Edge was subsequently appointed Hearing Officer to conclude this matter.

The TRM does not specifically recommend any changes to the proposed permit as a result of the public hearing comments received. However, the hearing record file contained a track changes version of the permit and a transmittal memo to Hearing Officer Vest indicating that SWDS prepared proposed changes to the permit consisting of “largely updates, clarifications, or additional requirements providing more safeguards to protect human health and the environment.” On July 10, 2018, Hearing Officer Edge submitted a written request to the author of the TRM to review the tracked changes version and to explain the reasons for the proposed changes. On July 10, 2018, Bryan Ashby submitted an Addendum to the TRM providing the requested information. The Addendum shows that, for the most part, the proposed changes were suggested to correct typographical errors or update information. However, the Addendum does explain that some of the changes in the draft permit are proposed by SWDS based on its response to comments in the TRM. The proposed changes, the Hearing Officer’s email, and the Addendum to the TRM are also included within the hearing record.

Valerie Edge prepared the attached Hearing Officer’s Report (“Report”), which sets forth the procedural history, summarizes and establishes the record of information and provides findings of facts, reasons and conclusions. The Report is incorporated herein by reference. The Report recommends that the Department reissue the NPDES permits to DCRC with the changes proposed by SWDS, as modified by the Hearing Officer’s Recommendations.

## **DISCUSSION**

DCRC seeks reissuance and modification of the NPDES permit originally issued to the Refinery in 1997. The permit would have expired in 2002, however, the Refinery filed a timely application for reissuance on February 28, 2002. The timely application for reissuance filed in 2002 administratively extended the permits until the Secretary makes a decision on the application. Attempts to process the application have been complicated and protracted. The permit application was pending in 2009 when Valero began to shut down the Refinery. The May 30, 2010 Agreement Governing the Acquisition of the Refinery, negotiated as DCRC acquired the Refinery and began its re-start, included an agreement that DCRC would submit an updated NPDES permit application and set a path forward to permit renewal. On December 1, 2010, DCRC updated the pending application. In 2011, DNREC prepared a preliminary draft permit with an interim Best Technology Available (“BTA”) determination for both impingement and entrainment. That draft permit allowed the Refinery 5 years to perform studies to either support or refute the BTA determination, but the draft permit was never finalized or put out for public comment and hearing.

SWDS explained at the hearing that while DNREC was working on developing the draft 2011 permit, EPA was working on developing regulations pertinent to the permit. In April of 2011, EPA proposed the Clean Water Act §316(b) regulation on the design and operation of cooling water intake structures in order to minimize adverse environmental impacts. EPA had committed to issuing the final version of the rule in 2012, and DNREC stopped pursuing issuance of the permit to wait for issuance of the regulation that would apply to the permit. EPA did not finalize the §316(b) regulation until August 15, 2014. On December 5, 2014, DCRC supplemented the Applications, providing additional information as required by the December 4, 2014 Settlement Agreement (“Settlement”) between DCRC and DNREC. Thereafter, SWDS rededicated its efforts to complete a proposed renewal version of the NPDES permit consistent with the 2014 §316(b) regulation. The draft permit that is the subject of the public hearing on March 24, 2015, resulted from SWDS’s efforts to produce a permit that complied with the requirements of the 2014 §316(b) regulation.

The Secretary's decision in this Order resolves the 2002 permit application.

The proposed draft permit that was the subject of the hearing contains interim Best Technology Available ("BTA") requirements for impingement and entrainment of fish, eggs and other aquatic lifeforms harmed by the water intake at the Refinery. The permit also requires the Refinery to undertake specific studies to assist in a later determination of final BTA as provided for by the applicable regulations. The permits will also allow for the proper operation of modified traveling screens, an improved fish return, reuse of water from the waste water treatment plant to reduce the amount of water taken from the River, changes in the flow rates to different outfalls, and sampling and monitoring, in addition to the studies.

The Addendum to the TRM explains the basis for the changes SWDS proposed to the draft of the permit that was the subject of the public hearing. The Hearing Officer's Report recommends that all of the changes proposed by SWDS be adopted because they are either in the nature of correcting errors, updating information or they respond to issues raised in the record, with two exceptions.

The Hearing Officer found no basis in the record for one of the conditions that SWDS proposed related to selenium. That proposed provision read:

"8) Compliance with Items 5-7 above are dependent upon the issuance of permits within 6 months of date of application (Item 4 above). If permits are not issued within 6 months of the date of application, the permittee will be granted an extension on the deadlines in Items 5-7 equal to the delay past 6 months of the issuance of the final permit necessary for construction and operation."

I agree with Hearing Officer Edge that there is no reasonable basis in the record to include the proposed condition, and it should be removed.

The Hearing Officer's Report also discusses SWDS's proposed language to correct condition C.1.b)3), based upon the Refinery's comment that the permit inaccurately referenced the timing of implementation of Final BTA, which is governed by 40 CFR 125.94(d). The condition proposed by SWDS reads:

"The permittee must comply with the impingement mortality standard specified below as soon as practicable following issuance of a final permit that establishes the entrainment requirements under 40 CFR § 125.94(d)."

Hearing Officer Edge recommends more fully incorporating the provisions of 40 CFR § 125.94(d) into that condition by adding the following sentence: "The Secretary may establish interim compliance milestones in the permit." I concur with that recommendation.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I make the following findings:

1. The Department provided legal notice of the public hearing and public comment was submitted into the record.
2. The Department considered public input from the public hearing record.
3. The Department prepared a final draft of the NPDES permit that incorporated changes proposed that correct errors, update information or respond to issues raised in the record.
4. The Department's proposed condition concerning selenium is not based in the record and should be removed.
5. The Department proposed language to condition C.1.b)3) based on the Refinery's comment that the permit inaccurately referenced the timing of implementation of Final BTA, which is governed by 40 CFR 125.94(d). The proposed language is appropriate, but should be augmented to reflect the Department's ability to include interim milestones in the permit.
6. The Record supports adopting the attached NPDES permit.

I make the following conclusions of law:

1. The Department has jurisdiction under its state and delegated federal authority, pursuant to *7 Del. C. Chapter 60*, and the NPDES Regulations to reissue the NPDES Permit.
2. The Department provided adequate public notice of the Application and the public hearing pursuant to *7 Del. C. §6004(b)*.
3. The Department considered all timely and relevant public comments and responded reasonably, which is established in the Hearing Officer's Report.
4. The Hearing Record supports reissuance of the NPDES Permit, in the form attached, and the permit includes reasonable conditions intended to protect the environment and public health.

### **REASONS**

In *7 Del. C. § 6001(c)(3)*, the General Assembly's purpose of providing a program for the protection and conservation of the water resources of the State, for public recreational purposes, and for the conservation of wildlife and aquatic life is stated. In *7 Del. C. §6001(a)(2)*, the General Assembly finds that the development and utilization of water resources must be regulated to ensure that the water resources of the State are employed for beneficial uses and not wasted. Reissuance of the NPDES permit will update the permit to reflect the existing requirements of state and federal law. According to the Addendum to the TRM, the Refinery has already installed the modified traveling screens and the improved fish return. The attached NPDES permit requires the Refinery to complete several different studies concerning the impacts of the Refinery's water intake within 54 months of permit issuance. The results of those studies are necessary to make informed decisions about how to reduce harm to the Delaware River and the environment. Issuance of the permit is the next step towards making the final BTA determinations for impingement and entrainment from the cooling water intake at the Refinery. The attached permit meets state and federal requirements, the public has commented on it, and the hearing record supports its issuance. Based on the above, it is my view that reissuance of the attached permit best furthers the purposes of *7 Del. C. Chapter 60*.

## **ORDER**

IT IS ORDERED that Department shall reissue the attached permit. The Department shall publish this Order on its web site and provide such public notice of the Order as required by the law, applicable regulations, and as the Department determines is appropriate.



Shawn M. Garvin  
Secretary